

No. 15,905

In the
United States Court of Appeals
For the Ninth Circuit

WILLIAM DORN, JR.

Appellant,

VS.

BALFOUR, GUTHRIE & Co., LIMITED,
a corporation,

Appellee.

Appellee's Brief

Appeal from the Judgment of the District Court
of the Northern District of California.

Honorable OLIVER D. HAMLIN, Judge.

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JURISDICTIONAL STATEMENT

Defendant appellee does not controvert the statement of pleadings and facts with respect to jurisdiction, appearing in appellant's brief under the head "Pleadings". Jurisdiction of the District Court was under 28 USC § 1332(a)(1). Jurisdiction of the court is under 28 USC §§ 1291 and 1294(1).

STATEMENT OF THE CASE

The first five paragraphs of the appellant's "Statement of Facts" are generally accurate, subject to the following corrections or amplifications:

- (1) At all times material to the complaint the *Rimac*, on which the plaintiff worked as a longshoreman, was under the command of Peruvian Naval officers (Finding 2, 1 R 76: 4-5).
- (2) No finding was made as to whether the plaintiff actually fell in any oil on the deck of the *Rimac* or, if he did, whether he was injured thereby (Findings, 1 R 75-77). These matters were seriously disputed at trial (Defendant's Opening Statement, 2 R 10).
- (3) The appellant's brief states (p. 4) that no finding was made on the issue of negligence. But the Court specifically found that Balfour, Guthrie & Co., Limited did not exercise or have any authority or duty to exercise any control over the operation or management of the vessel (Finding 3, 1 R 76: 16-18) or her decks or winches (Finding 4, 1 R 76: 19-21) and did not cause or permit oil to accumulate on her decks (Finding 4, 1 R 76: 22-23) or cause or permit her to become unsafe (Finding 4, 1 R 76: 24-25). These findings covered any possible issue as to negligence of Balfour, Guthrie & Co., Limited.

The Complaint was based upon the claim that Balfour, Guthrie & Co., Limited (hereinafter referred to as Balfour) "managed" the *Rimac*, jointly with others, during the time the plaintiff was on board (Amended Complaint, 1 R 8:24). In the appellant's brief (p. 4) it is contended that Balfour had "joint control" or "joint responsibility" with the Peruvian government. The District Court found specifically that Balfour had no such control, management or responsibility (Findings 3 and 4, 1 R 76). The only issue on this appeal is whether those findings are supported by the evidence.

ARGUMENT

A. The Findings Are Supported by the Evidence.

In the appellant's brief (p. 7, last paragraph) it is said that the "uncontradicted evidence of both sides" shows that Balfour had the "joint management" of the *Rimac*. It is difficult to characterize such assertions as more than frivolous.

In the first place, none of the testimony quoted in the Appendix to the appellant's brief would justify, must less require, a finding that Balfour had the management of the *Rimac*. In that testimony the witnesses spoke of assisting the vessel's master by arranging for stores and supplies (App., pp. i-ii), making Balfour's office available as a headquarters for ship's business (App., p. ii), advising, helping and cooperating with the master and purchasing supplies for him (App., p. iii), reporting on and counselling regarding troubles on shipboard (App., p. iv),* assisting, helping and cooperating with the master when difficulties arose (App., p. v), requests to the shipowner for instructions (App., pp. v-vi), coordination of unloading activities, arranging repair services and reporting troubles (App., pp. vi-vii), recording and advising stevedores of useful information concerning the ship's operating characteristics (App., pp. vii-viii), and arranging for vessel's arrival and contacting the master to learn his needs (App., pp. viii-ix). None of this would justify—must less require—a finding that Balfour had any control or management of the ship or responsibility for her condition.

Moreover, the record is replete with testimony concerning the limited functions assumed by Balfour. For example, the plaintiff put in evidence Balfour's Answers to Interrogatories, including No. 11 (Pl. Ex. 5, 1 R 39-40; 2 R 173: 9-16):

*On page iv of the Appendix, paragraph 4, third line, the word "we" should read "he"; see 2 R 174:20.

"No information is available as to the exact conversation or the exact terms of any oral agreement relating to services rendered to the *S.S. Rimac*. The services were rendered pursuant to an informal request, probably by telephone from Mr. F. L. Doelker, of Grace & Company (Pacific Coast), which was acting for W. R. Grace & Co., Lima and the Republic of Peru. Mr. Doelker spoke to Mr. L. P. Bailey, requesting Balfour to act as port husbanding agent for the *Rimac* on the basis as it had acted on prior occasions for other Peruvian vessels. It was understood that, as husbanding agent only, Balfour would not arrange for stevedoring but would perform only those services customarily performed by port husbanding agents—that is, to arrange for berthing the vessel and to arrange for such further services and supplies for the said vessel as might be requested by her master or by the Republic of Peru, as her owner. Such informal arrangements are common in the industry and the duties of a husbanding agent, as described, are well understood."

To the same effect is the Affidavit of Mr. Bailey (Pl. Ex. 2; 1 R 20-22; 2 R 137: 6-10):

"that Balfour did not at any time manage or have authority to manage the said vessel and did not have any function, activity or relationship with respect to the said vessel or her owners other than as port agent; That as port agent Balfour was assigned the function customarily performed by port agents except that it was not authorized to and did not arrange for stevedore services, or collect freight moneys; that Balfour did not invite the plaintiff or any other stevedore on board the *Rimac* and it neither had the authority to, nor did, consent to the plaintiff's presence there; that the only function customarily performed by a port agent and the only authority or duty given to Balfour was to arrange for berthing the vessel and to arrange for such further services and supplies for the said ves-

sel as might be requested by her master or by the Republic of Peru, as her owner; that Balfour's assistance to the *Rimac* including arranging for a Bar Pilot, arranging for a Bay Pilot and tug assistance, notification to the Marine Exchange. Exchange of ship movements, assistance in getting Customs clearance for the vessel, purchase of provisions, charts and rope, and arranging for similar services and supplies;

That port agents customarily do not have and Balfour did not have any authority or control over the vessel or her master, officers or crew or any authority or duty with respect to maintaining the vessel, her decks, winches or other equipment or keeping the same in safe condition; that Balfour did not perform or arrange for any work in connection with the operation or maintenance of the winches or maintenances of cleaning of the decks in the vicinity of the winches;

That the only employees of Balfour who were aboard or in the vicinity of the *Rimac* from August 27 through August 29, 1954, were C. F. Keefer and W. W. Carter;

That he had no knowledge or notice of the accident alleged in the Complaint prior to service of the Complaint;"

To the same effect was Mr. Bailey's testimony at the trial (2 R 141:13-142:23):

"Q. What is a port agent, Mr. Bailey?

A. Well, a vessel is scheduled to call at a port, San Francisco, and it will be the same formality at all ports. By the time she is due, an agent will make the necessary arrangements so that she can proceed to her loading or discharging berth, to start work as promptly as possible, with no delay.

In doing that, you will arrange, first of all, for entry of the custom house, arrange berth of the ship, arrange for pilots, if any are necessary, and linesmen, if they are necessary, to tie her up. That is putting your ship in the berth ready to work.

You then assist the master, and you then have an opportunity of meeting him, in giving him whatever information or assistance he may require, being a stranger in the port. Further, you arrange for the purchasing of any stores or supplies he may need. If he has sickness, arrange for the hospitalization or doctors.

The Court: If he has sickness?

The Witness: Yes, arrange for hospitalization or doctors. If there is a question of money to be advanced for the crew for some reason or other, payment of wages. You then establish a place for headquarters for the ship, which naturally is our office, where anyone having business with the ship would contact us; filing correspondence pertaining to the ship's operations, or the functioning of the ship, or anything that comes up in connection with the ship's work. That is the headquarters, the agent's office.

Mr. Garry: Anything else, Mr. Bailey?

A. No, that is about all.

Q. How about arranging for stevedoring, longshoring and so forth?

A. Arranging for stevedores would be a situation which would arise in connection with your arrangement with the owner. As a husbanding agent, you do not arrange for stevedoring, generally speaking. You can always arrange for stevedores as a husbanding agent."

The limited nature of Balfour's contacts with the vessel was pointed up by the testimony of Mr. Keefer, one of the two Balfour employees who went on board, that on each of his two visits to the ship he stayed only about an hour. (2 R 199: 6-13). Mr. Bailey's testimony was to the same effect (2 R 234: 13-235: 14):

"Q. How much time do your representatives normally spend aboard a ship while she is in port?

A. It will depend considerably on the length of time in which she is in port. It has been our policy

immediately on arrival, for our representative to be aboard the ship no matter where berthed, the San Francisco side, the Oakland side or Selby or Stockton. Our man proceeds to the ship and he can get through his duties, if there is not too much interference, within about an hour or hour and a half time, and leave the ship. That is the day of arrival.

If she is here for only one day or two days, he would probably go up again the next day just before sailing. If she is here a week, we might make one more trip during the week, and might not. We might do it by telephone, depending upon how busy we might be in the office.

If the Captain has any grievance or has any trouble, he can always phone us, or he generally comes in the office, but we don't tend the ship unless there is some reason for us to help the Captain or do something for him. They may call upon us to do so. So the ship being in port—well, say one of these ships would average three or four days, we might be on the ship not more than three times for an hour each time, or about an hour; not more than two hours.

Q. And if the ship is in port longer than that some days, you don't have anyone aboard at all?

A. There are many days we don't send anyone to the ships, sir."

There is clearly no basis whatever for the appellant's contention that the findings are not supported by evidence.

B. Since Balfour Did Not Have Control or Management of the RIMAC, Appellant's Authorities Are Not in Point.

Since the findings that Balfour had no control or management of the *Rimac* are fully supported, the appellant's authorities are clearly inapplicable and we will refer to them only briefly.

In the absence of a finding that Balfour had any control of the vessel, there is no possible basis for finding any duty to the plaintiff. Consequently the references in appellant's brief to the Restatement of Torts and other texts dealing with joint or concurrent tortfeasors are not in point. Decisions on liability of joint or concurrent tortfeasors are similarly out of place (*The Atlas*, 93 U.S. 302; *The Modemi*, 52 F.2d 756).

Since there is no issue before the court as to whether Balfour would be entitled to immunity as a result of its relationship with its principal, the Republic of Peru, we can see no possible relevance in *Hopkins v. Clemson College*, 221 U.S. 636, 31 S.Ct. 654 and *Contino v. B. & A. RR Co.*, 178 Fed. 2d 521.

In the *Contino* case it was found that the defendant railroad had engaged in a joint enterprise with a state agency to build and maintain an unsafe underpass and the railroad was held liable for its own negligence in that enterprise. But there is no issue on this appeal as to whether Balfour might be held liable for its own negligence. The findings that Balfour had no control, management or responsibility negate any basis for contending that Balfour was engaged in a "joint enterprise" with respect to the vessel. Surely no employee or agent is, as such, engaged in a "joint enterprise" with his principal so as to be liable for the principal's torts!

Similarly, decisions that a vessel's agent can be held liable for its own negligence are not in point: *U.S.B.E.F. v. Greenwald*, 16 F.2d 948; *Brady v. Roosevelt SS Co.*, 317 US 575, 63 S. Ct. 425; *Quinn v. Southgate Nelson Co.*, 121 F. 2d 190. There was never any contention that Balfour was negligent, aside from its alleged responsibility for the safe condition of the vessel. Nor can the appellant place any

reliance on cases involving conspiracy and concerted action, or aiding, abetting or participating in *intentional* torts or other breaches of duty: *Thompson v. Johnson*, 180 F.2d 431; *Meints v. Huntington*, 276 Fed. 245; *Montgomery Ward & Co. v. N.P. Term Co.*, 128 F.S. 475.

C. The Authorities Are in Accord that a Shoreside Husbanding Agent or Port Agent Is Not Responsible for the Vessel's Condition and Is Not Liable to Third Parties.

Assuming that a government agent is liable for his own torts, it has never been held that a mere husbanding agent could be held liable to third parties for defects in the ship's condition.

At one time, particularly in England, the term "ship's husband" was used to refer to a "managing owner" of a vessel, who acted as general agent for all of the other owners in managing all of the ship's affairs, including management of the vessel herself, as well as shoreside affairs. But the term "ship's husband" has not been used in that sense in recent years, at least in this country. It is applied now to an agent employed to assist the master and owner of the vessel with respect to the shoreside contacts which a ship must make while in port. See the testimony of Mr. Bailey, 2 R 141-142.

With respect to a *general* agent, which undertakes to act for the owner in connection with operation and management of the vessel, there have been substantial questions as to the general agent's liability to third parties with respect to the safe condition of the vessel. But even in that situation the Supreme Court held that the general agent did not have such possession and control of the vessel as to make it liable to a longshoreman injured on board. *Caldarola v. Eckert* (1947), 332 U.S. 155, 67 S. Ct. 1569. The court held the general agent not liable even though the agent, under the

standard form of General Agency Agreement with the United States, had expressly agreed to "equip, victual, supply and maintain" the vessel. Consistent with this, the Supreme Court held that such a general agent was also not liable to a seaman. *Cosmopolitan Shipping Company, Inc. v. Robert A. McAllister* (1949), 337 U.S. 783, 69 S. Ct. 1317:

"The Caldarola Case, 332 US 155, 91 L ed 1968, 67 S Ct 1569, undermined the foundations of *Hust*. See the dissent therein at pp. 161-163. Caldarola held that the general agents under the standard form contract were not in possession and control of the vessel so as to make them liable under New York law to an invitee for injuries arising from negligence in its maintenance, pp. 158, 159. Our ruling was based on 'the interpretation of that contract' as 'a matter of federal concern.' We do not think it consistent to hold that the general agent has enough 'possession and control' to be an employer under the Jones Act but not enough to be responsible for maintenance under New York law. It is true, as respondent argues, that Caldarola dealt only with the general agent's liability to a stevedore, as opposed to a crew member, under the law of New York. We think, however, that vicarious liability to anyone must be predicated on the relation which exists under the standard form agreement and the shipping articles between the general agent on the one hand and the master and crew of the vessel on the other. Caldarola held that this relation was not one which involved that proximity necessary to a finding of liability in the general agent for the torts of the master and crew. We perceive no reason why the rationale of this holding does not apply with equal force to a suit under the Jones Act. Under common-law principles of agency such a conclusion is required. * * *. (p. 793)"

If a *general* agent is not responsible to the third parties for the vessel's condition, *a fortiori* a mere port agent is

not. Indeed we are aware of only one other decision in which such a claim apparently was advanced—and then the court, in dismissing the complaint, found it necessary to say little more than this:

“it is manifest that defendant Garcia was no more to the vessel than a husbanding agent acting in every respect for its principal * * *.”

Romero v. International Terminal (1956, SDNY),
142 Fed. Supp. 570, *Affd.* on opinion below on this
point—(1957, C.A. 2) 244 Fed. 2d 409*

A vessel coming into a foreign port must make many arrangements with shoreside concerns for supplies and services needed in port. These arrangements cannot conveniently or economically be made without the assistance of a husbanding agent who knows the port and its facilities. There is no basis for the plaintiff's contention that a port agent, in agreeing to give such assistance, renders itself liable to any and every person who may be injured due to unsafe conditions aboard the vessel.

*Certiorari was granted by the Supreme Court, October 14, 1957, Docket No. 322, and the case has been restored to the calendar for reargument in October, 1958. However, it appears that the present question is not involved in the review by the Supreme Court. See 26 U. S. Law Week 3107.

CONCLUSION

The findings of the District Court are fully supported by the evidence and the judgment is in accord with all of the authorities. There is no ground for the appeal; the judgment should be affirmed.

Respectfully submitted,

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